

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2017/HP/1099

**IN THE MATTER OF: ORDER XXX RULE 14 OF THE HIGH COURT
RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA
AND ORDER 88 RULE 1 OF THE RULES OF THE
SUPREME COURT, 1999 EDITION**

AND

**IN THE MATTER OF: PROPERTY KNOWN AS HOLDING No ND/W73
NDEKE WEST, PETAUKE**

BETWEEN:

PULSE FINANCIAL SERVICES LIMITED

APPLICANT

AND

ZEPHY BANDA

1st RESPONDENT

ADELIA MTAMIRA MALENGA

2nd RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 14th DAY OF MARCH,
2018**

For the Applicant : Ms S. Kalima, J & M Advocates

For the Respondents : No appearance

J U D G M E N T

CASES REFERRED TO:

- 1. Brian S. Musonda (Receiver of First Merchant Bank Zambia Limited) (In Receivership) V Hyper Food Products Limited and Two others*
- 2. Reeves Malambo V Patco Agro Industries Limited SCZ No 20 of 2007*
- 3. Lackson Mwabi Mwanza V Sangwa Simpasa, Chisha Lawrence Simpasa 2011 VOL 1 ZR 436*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. **The High Court Rules, Chapter, 27 of the Laws of Zambia**
2. **The Rules of the Supreme Court, 1999 Edition**
3. **Halsbury's Laws of England, 4th Edition, Volume 20**
4. **Snell's Equity**

The Applicant commenced this action on 11th July, 2017, by way of Originating Summons claiming;

1. *Payment of all the sums of money owed by the 1st Respondent by virtue of a loan obtained by the 1st Respondent by various agreements amounting to an equitable mortgage executed by both parties, and dated 31st January 2014, the principal sum being K94, 442.68 and interest in the amount of K72, 382.15, bringing the total to K166, 824.83 with interest continuing to run up to the date of repayment of the loan, as per the loan agreement.*
2. *An order that under and by virtue of several agreements the Applicant is entitled to be considered as mortgagee of the properties described in the said agreement and to exercise all powers of a mortgagee including the power of sale, foreclosure and possession.*
3. *An order of foreclosure and possession of the mortgaged properties.*
4. *An order of sale of the mortgaged properties.*
5. *An order that the 2nd Respondent honours the guarantee offered as security for the loan obtained, by virtue of the guarantee agreement dated 30th January, 2013.*
6. *An order that the 2nd Respondent be ordered to pay all monies due the Applicant by virtue of the guarantor agreement.*

7. *Any other relief that the court may deem fit.*

8. *Costs.*

The affidavit in support of the Originating Summons states that the Applicant on 31st January, 2014 approved a loan facility in favour of the 1st Respondent in the amount of K100, 000.00, and which loan was secured by an equitable mortgage relating to property number ND/W73 Ndeke West Petauke, registered in the 1st Respondent's name. That exhibited to the affidavit are 'FMB1a' and 'FMB1b' being the land record, and the executed memorandum of mortgage for the property respectively.

That in pursuance of the loan facility, the 1st Respondent executed the following documents;

- a) Individual loan agreement (immovable) dated 31st January, 2014
- b) Individual loan agreement (movable) dated 31st January, 2014
- c) Assignment and transfer of specific assets (immovable) dated 31st January, 2014
- d) Assignment and transfer of specific assets (movable) dated 31st January, 2014
- e) Pledge on overall assets (immovable)
- f) Pledge on overall assets (movable) dated 31st January, 2014
- g) Power of attorney dated 31st January, 2014

These documents are exhibited as 'FMB2a'- 'FMB2g'. Further that the 1st Respondent also pledged various household goods as security for the loan obtained, in the name of a four plate cooker, a Samsung home theatre, a dining set and DSTV decoder. That also provided as security

was a Toyota Corolla registration number ALP 2637, whose certificate of registration was exhibited as 'FMB3'. It is also stated in the affidavit that the 2nd Respondent provided personal guarantee for the loan obtained by the 1st Respondent and executed the following documents;

- a) Specific Guarantor Agreement dated 30th January, 2013
- b) Guarantor Agreement and Transfer of Specific Assets dated 30th January, 2014
- c) Pledge of overall assets dated 30th January, 2014
- d) Power of Attorney dated 30th January, 2014

These documents are exhibited as 'FMB4a' to 'FMB4d' to the affidavit, and it is also stated that the 2nd Respondent also pledged further security in the form of household goods being an upright fridge, a four plate cooker, 21 inch television, DSTV decoder, mini hi fi system, and a display unit. It is also deposed in the affidavit in support of the Originating Summons that the 1st Respondent has defaulted on the repayment of the loan, and is indebted to the Applicant in the amount of K94, 442.68 as the principal amount, and K72, 382.15 being the accrued interest, bringing the total to K166, 824.83, as shown on the payment schedule exhibited as 'FMB5'. That the 1st Respondent has no defence, and the statement of account is exhibited as 'FMB6'.

The Respondents did not file any affidavit in opposition to the Originating Summons, despite being served process by way of substituted service.

At the hearing, Counsel for the Applicant stated that they relied on the affidavit filed in support of the Originating Summons, and also stated that the 1st Respondent obtained a loan of K100, 000.00 from the Applicant, and executed the documents exhibited as 'FMB1' to 'FMB2g'

to the affidavit. That the said loan was secured by an equitable mortgage relating to property number ND/W73 Ndeke West Petauke, and that the memorandum of mortgage and the land record were exhibited to the affidavit.

Further that the 1st Respondent also provided security in the form of a Toyota Corolla registration number ALP 2637, as shown on the certificate of registration exhibited as 'FMB3' to the affidavit. Counsel submitted that further security was provided by the 2nd Respondent who personally guaranteed the 1st Respondent's loan and executed guarantor agreements, transfer of assets, pledge of overall assets and a power of attorney, exhibited as 'FMB4a' to 'FMB4d'. That as could be seen from the payment schedule exhibited as 'FMB5', the 1st Respondent had defaulted on the repayment in the amount of K166, 824.83 comprising the principal and interest, and the Applicant claims payment of all monies due, and order that by virtue of the agreements exhibited, the Applicant be considered as a mortgagee with the rights to exercise the said powers of mortgagee, an order of foreclosure and sale, and that the 2nd Respondent honours the guarantee, any other relief that the court may deem fit, and costs.

The Applicant also filed submissions on 21st February, 2018 in which they submitted that a legal mortgage was created to secure the amount borrowed by the 1st Respondent. Reference was made to **Snell's Equity** which defines a mortgage as;

"A mortgage is a conveyance of some interest in land or other property as security for the payment of a debt or the discharge of some other obligation for which it is given. On satisfying the obligation in respect of which the mortgage

was given, the mortgagor has a right to redeem, that is, to recover full ownership in the property”.

In terms of the remedies that a mortgagee has in the event of the mortgagor defaulting on the payment of the loan, Order 88 Rule 1 of the Rules of the Supreme Court, 1999 edition was referred to, which is couched in similar terms as Order XXX Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia. It states that;

“(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely -

(a) payment of moneys secured by the mortgage,

(b) sale of the mortgaged property,

(c) foreclosure,

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property,

(e) redemption,

(f) reconveyance of the property or its release from the security,

(g) delivery of possession by the mortgagee.

(2) In this Order "mortgage" includes a legal and an equitable mortgage and a legal and an equitable charge, and references

to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.”

Reference was also made to the case of ***BRIAN S. MUSONDA (Receiver of First Merchant Bank Zambia Limited) (In Receivership) V HYPER FOOD PRODUCTS LIMITED AND TWO OTHERS***, arguing that in that case the Supreme Court considered the cumulative nature of a mortgagee's remedies and stated that;

“The mortgagee’s remedies are truly cumulative; leaving aside the fact that an equitable mortgagees remedies are more restricted than those of a legal mortgagee..... However, they are also alternative to each other....”

That in the case of ***REEVES MALAMBO V PATCO AGRO INDUSTRIES LIMITED SCZ No 20 of 2007*** it was stated that ***“A mortgagee is at liberty to exercise his rights to foreclose and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property”***.

With regard to the 2nd Respondent, reference was made to ***Halsbury’s Laws of England, 4th Edition, Volume 20*** which indicates the extent of a guarantor's liability as ***“the surety or guarantor, is a person who engages with the creditor of a third party to be answerable, in the second degree, for some debt, default, or miscarriage for which the 3rd party then is, or may be intended to become primarily liable to the creditor..... A person who provides a pledge or security for the performance of another person’s obligation is making himself, by means of that pledge or security, a surety for that other, just as much as if he pledges his personal debt.”***

Therefore, by the 2nd Respondent agreeing to act as guarantor for the loan obtained by the 1st Respondent and executing the guarantor agreement, she made herself surety for the 1st Respondent's obligation, just as much as if she were pledging her own personal debt. That paragraph 151 of *Halsbury's Laws of England, 4th Edition, Volume 20* states that ***"it has been said that a surety is a favoured debtor. He is entitled to insist upon a rigid adherence to the terms of his (surety's) obligation by the creditor, and cannot be made liable for more than he has undertaken"***.

I have considered the matter. Order XXX Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia provides that;

"Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a Judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say-

Payment of moneys secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge

or by any other person in, or alleged to be in possession of the property;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee.”

In this case the Applicant and 1st Respondent entered into an agreement on 13th January, 2013, under which the Applicant lent the 1st Respondent the sum of K100, 000.00 for a duration of 60 months, with interest to be paid on the amount at a rate of 3.5% per month, as seen on exhibit ‘FMB2a’ to the affidavit in support of the Originating Summons. As collateral for the loan, the 1st Respondent provided property number ND/W73 Ndeke West Petauke. Exhibit ‘FMB2b’ shows that the 1st Respondent executed an individual loan agreement (movable) under which a Toyota Corolla registration number ALP 2637, a four plate cooker, a Samsung Home theatre, dinning set and a DSTV decoder were given as collateral.

Exhibit ‘FMB2c’ being an assignment and transfer of specific assets (immovable) was also executed by the 1st Respondent on 31st January, 2014 under which property number ND/W73 Ndeke West Petauke was pledged as security, and the same property was pledged in ‘FMB2e’, the pledge of overall assets (immovable). The assets in ‘FMB2b’ were also pledged in the assignment and transfer of specific assets (movable), ‘FMB2d’, and ‘FMB2g’ the pledge on overall assets (movable). The Land Record for property number ND/W73 Ndeke West Petauke ‘FMB1a’ was submitted to the Applicant, as well as the white book for the vehicle ‘FMB3’.

Exhibit 'FMB5' is the payment schedule for the loan. This document shows that the 1st Respondent owes the Applicant the amount of K166,824.83. No opposition was filed to the amount owing, and I accordingly enter judgment in favour of the Applicant for that amount, which shall carry interest at the average short term deposit rate from date of issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment. The Applicant applied that pursuant to the agreements that it entered into with the 1st Respondent it be considered as a mortgagee of the property ND/W73 Ndeke West Petauke.

Exhibit 'FMB1b' the affidavit in support of the application is the mortgage deed that was executed between the Applicant and 1st Respondent in which ND/W73 was mortgaged as security for the K100,000.00 borrowed by the 1st Respondent. This mortgage was executed pursuant to the Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia. This Act in Sections 23 and 24 provides for the creation of mortgages under that Act. The Sections provide as follows;

“23. Every mortgage or transfer of mortgage executed in respect of any land to which this Act applies shall be in the prescribed form.

24. (1) A mortgage in respect of any land to which this Act applies may be created by the deposit of documents of title and such mortgage shall be evidenced by a document in the prescribed form.

(2) In this section, "documents of title" means a grant, a certificate of title, a lease or a sub-lease.”

Further regulations 12, 13 and 14 of The Housing (Statutory and Improvement Areas) Regulations under the said Act state that;

“12. Whenever any land is intended to be mortgaged or made security in favour of any person other than by way of deposit of documents of title, the mortgagor or if such mortgagor lacks legal capacity, the guardian or other person appointed by the court to act on his behalf in the matter shall execute the mortgage in Form 4 set out in the First Schedule, which must be registered.

13. A mortgage of any estate or interest in land shall have effect as security and shall not operate as a transfer or lease of the estate or interest thereby mortgaged, but the mortgagee shall have and shall be deemed always to have had the same protection, powers and remedies (including a power of sale, the right to take proceedings to take possession from the occupiers and the persons in receipt of rents and profits or any of them and in the case of land in leasehold, the right to receive any notice relating to the land the subject of the mortgage which under any law or instrument the mortgagor is entitled to receive) as if the mortgage had so operated as a transfer or lease of the estate or interest mortgaged.

14. (1) A power of sale of the whole or any part or parts of any property subject to a mortgage shall become exercisable by a mortgagee if any mortgage is made in the Form 4 set out in the First Schedule and the mortgage money payable thereunder has become due and the mortgage is not redeemed before sale, and every such power of sale shall be subject to

the powers and obligations and other provisions relating to sales by mortgagees contained in the Conveyancing and Law of Property Act, 1881, of the United Kingdom, or any statutory modification thereof applicable in Zambia, but neither the council registrar nor any person purchasing for value from such a mortgagee shall be bound or concerned to see whether all or any of the provisions of that Act have been complied with or whether any money remains due under the mortgage.

(2) A mortgagee exercising the said power of sale shall have power to transfer to the purchaser the whole estate or interest of the mortgagor in the property the subject of the mortgage freed from the right of redemption by the mortgagor and freed from all estates, interests and rights to which the mortgagee has priority, but subject to all estates, interests and rights which have priority to the mortgage.

(3) A transfer of mortgage shall not be registered unless such transfer is made in Form 5 set out in the First Schedule.

A perusal of exhibit 'FMB1b' to the affidavit in support of the Originating Summons shows that the said mortgage deed was made pursuant to Regulation 12 of the Act, and is in compliance with that format. Therefore a legal mortgage was created, and the question is what remedies are available to the Applicant in this matter.

In the case of **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA 2011 VOL 1 ZR 436** it was held that;

"2. The essential nature of a mortgage in its tradition form is that it is a conveyance of a legal or equitable interest in

property with a provision for redemption. That is to say, upon repayment of a loan, or the performance of some other obligation stipulated in the mortgage, the conveyance shall become void, or the interest shall become re-conveyed.

3. A principal right that arises when a mortgage is created is the right to redeem and reconvey the property; the subject matter of the security on payment of the principal and interest. The right to redeem the property that is subject of the security is inviolable.

4. The mortgagee's remedies are cumulative. A mortgagee is therefore not bound to select any one of the remedies, and pursue that particular remedy exclusively.

5. A mortgagee is at liberty to employ one or all of the remedies to enforce payment. For instance, if he sells the property for less than the mortgage advance, or debt, he may still sue the mortgagor upon the personal covenant for payment of the balance.

6. Foreclosure puts an end to other remedies because if the mortgagee takes the whole security, he cannot also claim payment.”

Counsel for the Applicant relying on the case of **BRIAN S. MUSONDA (Receiver of First Merchant Bank Zambia Limited) (In Receivership) V HYPER FOOD PRODUCTS LIMITED AND TWO OTHERS** stated that these rights of the mortgagee are cumulative, and I entirely agree. The remedies outlined in the **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA 2011 VOL 1 ZR 436** case above are available to a mortgagee of property held on title from the

Council, as can be seen from regulations 13 and 14 of the Housing (Statutory and Improvement Areas) Regulations seen above.

As regards the 2nd Respondent, she guaranteed payment of the K100, 000.00 lent to the 1st Respondent by the Applicant. She executed 'FMB4a', the specific guarantor agreement, 'FMB4b', the guarantor assignment and transfer of specific assets, 'FMB4c' the pledge of overall assets, and 'FMB4d' the power of attorney. Under 'FMB4a' the specific guarantor agreement the 2nd Respondent guaranteed the repayment of the K100, 000.00 borrowed by the 1st Respondent, and she pledged a number of household goods as security.

The 2nd respondent as guarantor is liable in the second degree in that the 1st Respondent is primarily liable to pay the Applicant the amount owed. In the event of the 1st Respondent failing to pay the amount owed, the 2nd Respondent is liable to pay. Therefore having signed the guarantor agreement and the 1st respondent having failed to pay both Respondents are liable to pay the K166, 824.83.

The amount owing shall be paid within thirty days from today by both Respondents, failure to which the Applicant as legal mortgagee shall be entitled to foreclose on the property known as ND/W73 Ndeke West Petauke, possess it and sell the same, to recover the amount owing. Costs shall go the Applicant, to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 14th DAY OF MARCH, 2018



S. KAUNDA NEWA
HIGH COURT JUDGE